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No. 628

In the Supreme Court of the United States

OCTOBER TERM, 1960

DONALD K. SCHULTZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinions of the District Court are reported at 174 F. Supp. 488 and 176 F. Supp. 405. The opinion of the Court of Appeals (Pet. App. 3-10) is reported at 282 F. 2d 628.

JURISDICTION

The judgment of the Court of Appeals was entered on October 6, 1960 (Pet. App. 11). The petition for a writ of certiorari was filed on January 4, 1961.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

A fifteen-year-old boy who had been invited to a naval base as the social guest of families assigned to the base was accidentally shot by another boy while on a private camping and hunting trip on other Government property within the jurisdiction of the base. The question presented is whether the Court of Appeals, on this record, properly interpreted and applied Maine law in holding that the United States was not liable under the Federal Tort Claims Act for this injury.

STATUTE INVOLVED

Section 1346(b) of the Federal Tort Claims Act, 28 U.S.C. 1346(b), provides:

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

STATEMENT

This is a suit under the Federal Tort Claims Act, 28 U.S.C. 1346(b), by Donald Schultz and his father for injuries sustained by Donald on April 29, 1953. On that day, Donald, then aged 15, was accidentally wounded by a camping companion while on a Government naval reservation known as Fort Foster, located in the state of Maine (R. 3b), five miles from the Portsmouth, New Hampshire, Naval Base.

In brief, the record shows that, two days before the accident, Donald had been invited to the Base as a social guest of Robert McAfee, the fifteen-year-old son of a naval officer (R. 57b). He spent the night of April 27, 1953, on the Base in Robert's home (R. 58b). The next morning, they joined two other boys (sons of Captain Ferriter, a ranking naval officer at the Base) and prepared for overnight camping at Fort Foster (often used by naval personnel and their families for recreational purposes) (R. 3b). All four were transported to Fort Foster in a Government patrol vehicle by naval personnel making a routine inspection of the reservation (R. 60b). The boys spent the afternoon hunting and shooting (R. 62b-63b). The following morning, while waiting for the patrol vehicle to take them home, Donald and another boy began wrestling on the top of a small hill near the road. While they were so engaged, Robert,

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"R. — a" refers to the Government's appendix in the Court of Appeals; "R. — b" to the petitioners' appendix in that court. "Pet. App." refers to the appendix to the petition for certiorari.

Donald's host, picked up a gun and aimed at a piece of paper which he had thrown into the air. In the process, he accidentally shot Donald who had just stood up in the line of fire (R. 21a-22a, 3b). Donald was seriously injured.

Suit was filed by Donald and his father against the Government, under the Federal Tort Claims Act, in the District of Maine; petitioners also filed suit in the same court against Robert's father, Captain McAfee. This latter suit was subsequently settled with a $15,000 payment to Donald (R. 13b). The District Court found the United States liable under the Tort Claims Act for failure to supervise or stop the use of firearms by the boys on its property (R. 24a), and on August 25, 1959, awarded $50,097.00 in damages to Donald and his father (R. 13b).

The Court of Appeals reversed. After examining and applying Maine law, it held that Donald was at most a mere licensee at the time of the injury. Consequently the Government, as a landowner, had no duty to supervise the conduct of the boys who had come onto the Fort for their own private recreational purposes (Pet. App. 9). The court noted that, irrespective of Donald's status at the Base itself, he had not been expressly invited to the Fort by the United States Government; although the Fort had been used as a recreational area it was never designed, maintained or designated for recreational purposes. The court also ruled that under Maine law the facts here did not give rise to any implied invitation on the part of the Government to Donald to visit the Fort, and

held that the United States was not liable as a landowner for the injury.

The court then discussed petitioners' remaining contention that the Government was liable for Captain Ferriter's[2] alleged negligence in allowing his two sons, Robert McAfee, and Donald to go on the camping and hunting trip alone. Without passing on the question of whether Captain Ferriter had actual or constructive knowledge of the allegedly dangerous use of firearms by some of the boys on prior trips, the court noted that he had no authority to bind the Government with responsibility for furnishing the boys with private recreational facilities. The United States could not be held liable for Captain Ferriter's alleged negligence while he was "engaged purely in entertaining guests of his son." (Pet. App. 10).

ARGUMENT

The issue of the Government's liability in this Tort Claims Act suit turns mainly upon the application of state law to the particular facts of the case. The Court of Appeals properly read and applied Maine law in holding that the minor petitioner was a licensee and hence that the Government did not owe him any duty to supervise the recreational activities which gave rise to his unfortunate injury. This holding involves no more than a construction of local law in the light of this record, and presents neither an issue of

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[2] Captain Ferriter was the officer in charge of security at the Base. His two sons had accompanied Donald and Robert on the camping and hunting trip.

great significance nor any conflict with another court. There is no occasion for further review.

1. Under the law of Maine, as is generally true in most jurisdictions, the status of an invitee is conferred only upon those visitors who are on the land by virtue of either an express or implied invitation by the landowner. *Lewis* v. *Mains*, 150 Me. 75, 77, 104 A.2d 432, 433; *Foley* v. *Farnham Co.*, 135 Me. 29, 34; 188 Atl. 708, 712; *Kidder* v. *Sadler*, 117 Me. 194, 196-197, 103 Atl. 159, 160-161. An express invitation must be given by the landowner or one of his agents on his behalf. An implied invitation, on the other hand, arises under Maine law only where there is a "business purpose" for the visit (*Robitaille* v. *Maine Central R.R. Co.*, 147 Me. 269, 271, 86 A.2d 386, 387; *Kidder* v. *Sadler*, *supra*; *Nelson* v. *Burnham & Morrill Co.*, 114 Me. 213, 95 Atl. 1029) or a "mutuality of interests" between the landowner and the visitor. *Foley* v. *Farnham Co.*, *supra*; *Kidder* v. *Sadler*, *supra*. In the absence of such an invitation the visitor is at most a licensee to whom the landowner does not owe any ordinary duty of due care; his obligation is simply not to injure the visitor wantonly or to set traps for him.

Petitioners assert that the court of appeals improperly applied these tests in determining that the minor petitioner was a licensee at the time of his injury. They argue that there was evidence of an express invitation, and, alternatively, that there was a sufficient "mutuality of interest" to support the finding of an implied invitation. The short answer to their first contention is that, although there was evi-

dence of an express social invitation extended by the families of naval officers,[1] there was no evidence of any official invitation on behalf of the United States by a Government employee acting within his official capacity. As for the implication of an invitation, petitioners claim that there was a sufficient "mutuality of interest" because Donald's visit served to uphold the morale of the Navy families, and thus benefitted the Government to some extent. But, as the Court of Appeals noted, this argument is no more than tenuous with respect to Donald's visit to the Base itself, and wholly devoid of merit with respect to his trip to the Fort which was never designed, maintained or even designated by the Government for recreational purposes (Pet. App. 8). In its recent decision in *Lewis* v. *Mains*, 150 Me. 75, 104 A.2d 432, the Maine Supreme Court held that there was not adequate "mutuality of interest" between a landowner and the child of his tenant farmer to sustain the finding of an implied invitation for the child to use a different part of the premises not included within the original express or implied invitation to the tenant. 150 Me. at 77, 104 A.2d at 433. This holding is squarely applicable to Donald's use of the Fort facilities as distinguished from Captain McAfee's quarters at the Base. As the Court of Appeals observed, the *Lewis* case is so "closely in point on its facts" that it "rules the case at bar" (Pet. App. 8).

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[1] Petitioners stipulated that Donald was on Government property at the personal invitation, and as a guest, "of the Ferriter and McAfee families" (R. 3b).

But even in the absence of this controlling and recent Maine decision, it would be assumed that the court of appeals correctly applied Maine law since it is constantly called upon to decide issues under the law of that state. See *Propper* v. *Clark*, 337 U.S. 472, 486-487; *Estate of Spiegel* v. *Commissioner*, 335 U.S. 701, 707-708.

2. The conflict petitioners assert between the decision below and *Stewart* v. *United States*, 186 F.2d 627 (C.A. 7), does not exist. In the first place, *Stewart* was concerned with an entirely different area of tort law; it turned largely on the extent to which the United States, in storing hand grenades at an army installation, was obligated to conform to a local statute and local rules governing private owners of explosives. Second, *Stewart* applied the law of Illinois to circumstances differing considerably from those present here.

Nor is the district court's decision in *Beasley* v. *United States*, 81 F. Supp. 518 (E.D.S.C.), in conflict with the instant case. There, liability was imposed, under the law of another state, because the Government had actual knowledge that the minor plaintiff (aged 10) was in the process of carting off some

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There is an additional ground precluding imposition of liability on the United States under the facts of this case. While the courts below did not pass on the contention, under Maine law any potential liability of the United States was terminated by the intervening dangerous conduct of Robert McAfee. See, *e.g.*, *Curtis* v. *Jacobson*, 142 Me. 351, 54 A.2d 520; *Hawkins* v. *Theater Co.*, 132 Me. 1, 161 Atl. 628; *Currier* v. *McKee*, 99 Me. 364, 59 Atl. 112; Prosser, *Torts* § 49 (1955 ed.).

abandoned artillery shells for the purpose of dismantling them, and that other boys had been playing dangerously in the area. 81 F. Supp. at 523-524. In the present case, however, there was no evidence of actual or constructive knowledge on the part of Government officials of the reckless use of firearms. The testimony describing some of the boys' practices which petitioners quote on pp. 21-22 of their petition is relevant to the issue of whether such conduct may or may not have occurred, but petitioners were unable to show that any Government official ever had actual knowledge of it. See the opinion below, Pet. App. 6. Nor could petitioners successfully establish that the use of firearms by teenagers was reckless *per se*, thus creating constructive knowledge giving rise to a duty of supervision.

3. Petitioners also argue that the court of appeals improperly held that, putting aside the Government's obligations as landowner, it could not be bound by Captain Ferriter's arrangements for the recreational activities of his son and guests; on this phase of the case a conflict is suggested between the decision below and this Court's ruling in *Hatahley* v. *United States*, 351 U.S. 173. However, in *Hatahley* the Government was held liable under the Tort Claims Act for certain willful torts committed without proper authority by federal employees in seeking to enforce a federal statute (the Taylor Grazing Act). This holding that those officials were acting within the scope of their employment although their conduct was beyond their actual legal authority is irrelevant

to the instant case. Here, there is no claim of a deliberate or malicious tort on the part of a federal employee; and there is no suggestion that the challenged activity occurred in the course of enforcing federal law. All that is involved, as the court below noted, is whether the United States can be held liable under the Tort Claims Act for the conduct of a naval officer "engaged purely in entertaining guests of his son" (Pet. App. 10). Fundamental principles of *respondeat superior* require this question to be answered in the negative.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari be denied.

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